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No. 90-536

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN GARD, et al.,

Petitioners,

v.

WISCONSIN STATE ELECTIONS BOARD, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF WISCONSIN

BRIEF IN OPPOSITION OF THE WISCONSIN STATE ELECTIONS BOARD

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THE DECISION BELOW ANNOUNCES NO NEW LAW. THE WISCONSIN SUPREME COURT'S DECISION IS AN OBVIOUS APPLICATION OF BUCKLEY v. VALEO.

The petitioners ask this court to accept review of this case, a case with virtually no record, because the Wisconsin Supreme Court "substituted a rational basis test for the

strict scrutiny required by this Court's decisions" (Pet. 13). The Wisconsin Supreme Court did no such thing and petitioners know it. The Wisconsin court summarized its unanimous holding: "We conclude that there is a compelling state interest which justifies placing marginal restrictions on First and Fourteenth Amendment rights. Furthermore, we conclude that the Wisconsin legislature has narrowly tailored its aggregate contribution limit to accomplish its achieved end--the prevention of either actual or potential corruption" (A. 4-5).

The petitioners argue that the Wisconsin court's discussion of the "potential" for corruption is improper because this Court has only identified the prevention of actual or apparent corruption as sufficiently compelling (Pet. 13-14). The state interest in preventing the potential for corruption, or potential corruption, according to petitioners, is somehow different from the

state's interest in preventing actual or apparent corruption. At first glance the petitioners' argument appears to be mere semantic niggling. Upon consideration, it is clear the argument does not even rise to that level.

It is of course true that the only interests thus far identified as sufficient for intruding on first amendment freedoms in campaign financing are the prevention of actual or apparent corruption. Austin v. Michigan Chamber of Commerce, ___ U.S. ___, 110 S. Ct. 1391 (1990). But in Austin, this court also reiterated its holding in F.E.C. v. National Right To Work Committee, 459 U.S. 197 (1982) (NRWC) that it accepted "Congress' judgment that it is the potential for such influence that demands regulation." Austin, 110 S. Ct. at 1398 (citation omitted; emphasis in original).

The Wisconsin court's discussion of the "potential" impact of contributions on

candidates hardly heralds a lower level of constitutional scrutiny or an ignoring of this court's precedents. The Wisconsin court, like this Court in Austin, was simply finding a necessary prerequisite to its ultimate finding; if a type of contribution did not have the potential for corrupting a candidate it could not possibly further the compelling state interests in preventing actual or apparent corruption. See First National Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978).

Determining whether contributions or independent expenditures have a potential to corrupt is simply a threshold inquiry. The courts' language reflects the fact that the campaign finance laws, federal and state, are designed to prevent the occurrence of corruption. NRWC, 459 U.S. at 208. Therefore, the "risk of corruption" justifies "the need for prophylactic measures where corruption is the evil feared." NRWC, 459

U.S. at 210. The petitioners' argument rests on unexplained, and probably inexplicable, differentiations among the "occurrence" of corruption, the "risk" of corruption, the "danger" of corruption, the "potential" for corruption and the "possibility" of corruption. The argument reduces constitutional analysis to hairsplitting.

The Wisconsin court's finding that there is a potential for narrow issue PACs with large aggregations of wealth to circumvent the PAC-candidate's contribution limitations (A-25) and a potential for national political party money to flow to the state and local party committees and then to individual candidates (A-27), mirrors this Court's acceptance of the "serious danger" posed by the "significant possibility that corporate political expenditures will undermine the integrity of the political process." Austin, 110 S. Ct. at 1402.

The Wisconsin court's holding hardly exhibits "blind deference" (Pet. 15) to the Legislature. The court said:

> We conclude, however, that where the First Amendment is involved we cannot blindly defer to the legislative determination of where the constitutional balance should be struck. "To the extent that the Government suggests that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution." Sable Communications of California, Inc. v. F.C.C., ___ U.S. ___, 109 S.Ct. 2829, 2838 (1989). Therefore we independently review the legislative determinations that sec. 1126(9)(a), Stats., was necessary to prevent corruption or the appearance of corruption and that it was the least restrictive means of achieving that legislative goal. We emphasize that we are reviewing the legislative decision to place an aggregate limit on contributions from a particular source and not the legislative decision of where to place that limit, i.e. 65 percent.

(A. 16 - A. 17).

In F.E.C. v. National Conservative Political Action Comm., 470 U.S. 480 (1985) (NCPAC), the court did not defer to the

Legislature, not because the regulation involved activity by corporations (Pet. 15), but because the regulation involved independent expenditures which the court found did not pose the potential for corruption inherent in campaign contributions. NCPAC, 470 U.S. at 501.

The Wisconsin court, like this Court in Buckley and NRWC, first found that campaign contributions have the potential to corrupt and then found that the Wisconsin contribution limitations directly further the state goal of preventing actual or apparent corruption, and were narrowly tailored to meet those goals.

The Wisconsin court's decision announces no new test; the court applied the same test this court applied in Buckley and later cases. The Wisconsin regulations are no different from the regulations approved in Buckley.

It is universally agreed that the court in Buckley held that the need to control the actual or perceived corrupting influence of

large contributions justified limiting the amount that any person or group could contribute to a candidate or political committee. Buckley, 424 U.S. at 20-27. The holding in Buckley goes further, however. This Court not only approved limitations on individual contributions to candidates, but also an overall limitation on total contributions by an individual during any calendar year. The Court recognized that this imposed "an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support" but recognized that the restraint served "to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." Buckley, 424

U.S. at 38. The court found this additional restriction "no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." Buckley, Id. A law which prohibits contributions to anyone after a certain level is quite clearly constitutional.

The Buckley court also upheld the constitutionality of the Presidential Election Campaign Fund. One of the features of this law was that in order to be eligible for public funds the candidate had to pledge not to incur expenses in excess of a statutory entitlement and also had to pledge "not to accept private contributions except to the extent that the fund is insufficient to provide the full entitlement." Buckley, 424 U.S. at 88. Under this system, each major-party candidate in the general election for president was eligible for $20,000,000 in public financing. If the public financing fund was insufficient, however, the candidate

could accept private contributions, but only to the extent of the insufficiency. Therefore, if $15,000,000 per candidate were available, each candidate could accept $5,000,000 in private contributions and still be eligible for public financing. Since the $5,000,000 limit was reached, a candidate who accepted contributions would violate the law.

Although the Court's discussion in Buckley involved the Presidential Election Campaign Fund, not the specific limitation in sec. 11.26(9)(a), the Court necessarily approved a critical feature of both laws; once a certain level of contributions is reached, the law may prohibit a candidate from accepting more contributions. The restriction against accepting contributions beyond the limitations set in sec. 11.26(9)(a) is no more onerous a restriction than the limitation in the Presidential Election Campaign Fund which prohibited a candidate from accepting private

contributions beyond the insufficiency in the fund.

Section 11.26(9)(a) is the only limitation on contributions from party committees (A-26). The law also has the effect of guaranteeing party committees at least twenty percent of the candidate's disbursement level (A-25). Contrary to petitioners' assertion (Pet. 19) it is absolutely true that a candidate may always return some contributions in order to accept contributions from other committees. Quite obviously, in-kind services themselves cannot be returned, but an equivalent amount in cash certainly can. The petitioners have never suggested that Mr. Gard received so many in-kind services that he did not have earlier cash contributions to return.

Under Wis. Stat. sec. 11.06(8), a contribution may be returned at any time, "before or after acceptance." Therefore, if a candidate receives a contribution which makes

him exceed the aggregate contribution limit of sec. 11.26(9), he or she has fifteen days either to return that part of the contribution which exceeds the limitation or return an equal amount of an earlier contribution. Alternatively, he or she could give the excess to a charity or the common school fund. Sec. 11.12(2).

The candidate does not violate the contribution limitation amount in sec. 11.26(9) unless he exceeds the limitations for more than fifteen days. Sec. 11.06(8). This provision of the law means that any PAC or party committee may make at least a symbolic contribution to a candidate's campaign even if the candidate has reached the statutory limits. If the candidate wishes to accept the later contribution, he or she need only return or donate an equal amount of an earlier contribution within fifteen days of receipt of the later contribution.

The petitioners apparently believe that political parties are never themselves corrupt; that political parties never corrupt candidates (Pet. 16). History teaches otherwise. Both the Tammany Hall machine in New York and the Daley machine in Illinois are but two prominent examples. The limitations on party contributions are necessary not only because PACs could avoid their campaign limitations by funneling money through party committees, but also because political parties themselves pose a risk of corruption.

The law reflects the Legislature's determination that the risk of corruption from political party committees is less than the risk of corruption from PACs. The law also reflects a legislative recognition that political parties, unlike PACs, cannot make independent expenditures. Therefore, political parties are guaranteed the opportunity to fund twenty percent of a candidate's campaign and, depending on the

amount of PAC contributions, up to sixty-five percent of a candidate's campaign. Furthermore, a party may raise and spend as much money as it wants on party activities and may exhort voters to "vote democratic" or "vote republican" as often as it wishes without those expenditures being considered contributions to any of the candidates who benefit from the advertising.

Under petitioners' analysis, any limitation on party contributions to candidates would be unconstitutional. That clearly is not the law. Reasonable contribution limitations on all entities were held constitutional in Buckley. The only question is whether Wisconsin's law, which guarantees parties twenty percent of the contribution limitation, and up to sixty-five percent of that limitation, is reasonable. Nothing in the record suggests that it is not.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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